IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UNITED STATES, Plaintiff-Appellee v. WILEY R. KUYRKENDALL, Defendant-Appellant GREENBRIAR HOLDINGS, *et al.*, Defendants	)	No. 17-1713

APPELLEE'S MOTION TO TRANSFER APPEAL TO THE FIFTH CIRCUIT AND HOLD BRIEFING IN ABEYANCE

The United States, appellee herein, by its undersigned counsel, moves this Court to transfer this appeal to the United States Court of Appeals for the Fifth Circuit, where jurisdiction and venue properly lie. The Government also requests that briefing be held in abeyance while the Court considers this motion. The reasons for this motion are set forth below.

STATEMENT

This is an appeal brought by Wiley R. Kuyrkendall from the November 21, 2016, final judgment of the United States District Court for the Southern District of Mississippi. (Doc. 68.[1])

Prior to this civil action, in August 2009, a jury convicted Kuyrkendall of four counts of failing to file federal income tax returns, under I.R.C. § 7203, for tax years 2002 through 2005. *United States v. Kuyrkendall*, No. 3:09-cr-18 (S.D. Miss.). In a related case, he pleaded guilty, in October 2009, to two counts of criminal contempt, under 18 U.S.C. § 401(3). *United States v. Kuyrkendall*, No. 3:09-cr-117 (S.D. Miss.). He was sentenced to a total of 46 months in prison.

On September 25, 2014, the United States filed its complaint in this case (Doc. 1), seeking to reduce to judgment (pursuant to I.R.C. § 7402) Kuyrkendall's unpaid federal tax liabilities for tax years 2001 and 2002, and to foreclose the federal tax liens on certain parcels of real property. The Government filed an amended complaint on October 15, 2014. (Doc. 3.) Pursuant to I.R.C. § 7403, the Government named as defendants people and entities, in addition to Kuyrkendall, who may have claimed an interest in the properties at issue. The other defendants in this action did not join in the notice of appeal. (*See* Doc. 70.)

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[1] "Doc." references are to the documents in the original record, as numbered by the Clerk of Court for the Southern District of Mississippi in Case No. 3:14-cv-751. "I.R.C." references are to the Internal Revenue Code, 26 U.S.C.

In due course, the Government filed a motion for summary judgment. (Docs. 44-45.) Kuyrkendall thereafter filed a motion to dismiss, in which he appeared to argue that the District Court lacked subject-matter and personal jurisdiction. (Docs. 48-49; *see* Doc. 64 at 3.) The court denied Kuyrkendall's motion and granted summary judgment in the Government's favor. (Doc. 64.) The court concluded that it had personal jurisdiction over Kuyrkendall because he is a resident of the State of Mississippi, and the court observed that Kuyrkendall's "challenge to subject matter jurisdiction is based on frivolous tax defier arguments, much of which are unintelligible." (*Id.* at 3.)

With respect to the Government's motion for summary judgment, the court noted that Kuyrkendall admitted that he did not file a federal income tax return for 2001 or 2002. (*Id.* at 4.) The Internal Revenue Service assessed his income tax liabilities for those years, and satisfied its burden of demonstrating the validity of the tax assessments. (*Id.* at 5.) Kuyrkendall "[did] not dispute the validity of the assessments," and instead "advance[d] meritless tax defier contentions." (*Id.* at 5.) Inasmuch as there was no genuine issue of material fact regarding whether Kuyrkendall was liable for the unpaid tax liabilities for 2001 and 2002, the court entered judgment in favor of the United States in the amount of $434,050.44, plus interest and statutory additions. (*Id.* at 5; Doc. 68.) One parcel of real property listed in the Government's amended complaint was sold during the District Court proceedings, and the court ordered foreclosure of the federal tax liens against the remaining parcel. (Doc. 64 at 5-7; Doc. 69.) On November 21, 2016, the court entered final judgment (Doc. 68), as well as a decree of foreclosure and order of sale (Doc. 69).

Kuyrkendall filed a notice of appeal on a form that the District Court provided for appeals to this Court. (Doc. 70.) The District Court Clerk's Office understandably transmitted the notice of appeal to the

Fifth Circuit, where this appeal should proceed. But an annotation on the District Court docket, entered February 2, 2017, stated that the appeal was transmitted to the Fifth Circuit "in error," and that the case was "being re-transmitted to the U.S. Court of Appeals for the Federal Circuit." On that same day, however, the Fifth Circuit Office of the Clerk issued a letter to Kuyrkendall, advising him that his appeal would continue in that court, unless he filed a motion to dismiss. The Fifth Circuit docketed the appeal as No. 17-60031, and issued a briefing schedule.

Kuyrkendall thereafter moved to dismiss the appeal in the Fifth Circuit, stating that he viewed this Court as the only appellate court with jurisdiction over the appeal. The Fifth Circuit accordingly dismissed the appeal, and this Court docketed the instant appeal on March 1, 2017. But, as discussed *infra*, this Court lacks jurisdiction to review the District Court's decision, and the appeal should be transferred to the Fifth Circuit, where the appeal may be heard.

DISCUSSION

The Fifth Circuit has jurisdiction, and is the proper venue for this appeal.

This Court's jurisdiction to review final decisions and certain interlocutory orders of the federal district courts is limited to review of those decisions and orders set forth in 28 U.S.C. §§ 1292(c) and (d), and 1295. 28 U.S.C. § 1291. This Court lacks jurisdiction to review Kuyrkendall's appeal, because the District Court's decision in this case does not fall within any of those statutory provisions. Indeed, although this Court has jurisdiction to review tax refund suits decided by the Court of Federal Claims, see 28 U.S.C. §§ 1295 and 1346(a)(1), it does not have jurisdiction of an appeal in a case such as this one, where the Government brought suit in a federal district court to collect unpaid taxes. *See* 28 U.S.C. §§ 1291, 1292 (c) and (d), 1295. Rather, such a case is governed, as relevant here, by 28 U.S.C. §§ 1291 and 1294. *Id.*

Under 28 U.S.C. § 1291, "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Moreover, 28 U.S.C. § 1294 provides that "appeals from reviewable decisions of the district and territorial courts shall be taken . . . [f]rom a district court of the United States to the court of appeals for the circuit embracing the district." 28 U.S.C. § 1294(1). The decision at issue here was entered by the United States District Court for the Southern District of Mississippi, and that district is located (*i.e.*, "embrace[d]") within the Fifth judicial circuit. 28 U.S.C. § 41. Accordingly, jurisdiction for this appeal (as well as venue) lies in the United States Court of Appeals for the Fifth Circuit.

Under 28 U.S.C. § 1631, this Court "shall, if it is in the interest of justice," transfer this appeal "to any other court in which the . . . appeal could have been brought at the time it was filed or noticed." In this case, that court is the Fifth Circuit, and the United States therefore asks this Court to transfer the appeal to the Fifth Circuit.

The Government notes that Kuyrkendall's informal opening brief is due on April 22, 2017. To preserve judicial resources and promote the efficient resolution of this case, we request that briefing be held in abeyance pending the disposition of the instant motion.

Counsel for the Government sought the views of Kuyrkendall on this motion, and he opposes the motion to transfer venue.

CONCLUSION

For the foregoing reasons, this appeal should be transferred to the Fifth Circuit, and the current briefing schedule should be held in abeyance while this Court considers this motion.

Respectfully submitted,

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Acting Assistant Attorney General

/s/ Norah E. Bringer

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DECLARATION

I, Norah E. Bringer, of the Department of Justice, Washington, D.C., state as follows:

1. I am an attorney employed in the Appellate Section of the Tax Division, United States Department of Justice, and in that capacity I have been assigned the primary responsibility for handling the above-captioned case on behalf of the appellee.

2. The facts set forth in the accompanying motion are true to the best of my knowledge and belief.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct. Executed on March 16, 2017, in Washington, D.C.

/s/ Norah E. Bringer
NORAH E. BRINGER

CERTIFICATE OF SERVICE

It is hereby certified that, on March 16, 2017, I caused the foregoing documents to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Federal Circuit using the appellate CM/ECF system.

I further certify that I have caused the foregoing documents to be mailed by first-class mail, in an envelope addressed to the appellant at the following address:

Mr. Wiley R. Kuyrkendall
200 Grandview Court
Pearl, MS 39208

/s/ Norah E. Bringer
Norah E. Bringer
Attorney